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April 6, 2022

VIA ELECTRONIC FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Application of Aqua Pennsylvania Wastewater, Inc. Pursuant to Sections 1102, 1329, and 507 of the Public Utility Code for Approval of its Acquisition of the Wastewater System Assets of the Delaware County Regional Water Quality Control Authority, Docket No. A-2019-3015173

Dear Secretary Chiavetta,

This letter responds on behalf of Sunoco Partners Marketing & Terminals, L.P. (SPMT), a party to this proceeding, in opposition to Aqua Pennsylvania Wastewater, Inc.'s ("Aqua") March 25, 2022 letter requesting the Commission to act on and grant its Petition for Interlocutory Review and Answer to a Material Question (Petition) from the April 16, 2021 Stay Order entered by Administrative Law Judge F. Joseph Brady ("ALJ") so as to allow the remand proceedings directed in the Commission's March 30, 2021 order ("March 30 Order") in this Section 1329 application proceeding¹ to resume. Aqua's request should be denied; proceeding now risks the "wasteful duplicative litigation" the Stay Order was issued to prevent. Stay Order at 3.

First, and fundamentally, **the Commission likely lacks jurisdiction to proceed with the remand directed in the March 30 Order under Pa. R.A.P. 1701, because the March 30 Order itself is the subject of a pending appeal in the Commonwealth Court.** The County of Delaware appealed the March 30 Order. Significantly, although Aqua and the Commission moved to quash the appeal on grounds the March 30 Order is interlocutory and non-appealable, the Court did not

¹ Aqua seeks approvals to acquire the assets of the Delaware County Regional Water Quality Control Authority ("DELCORA").

grant the motions to quash the appeal, but instead decided to hear arguments on both the merits of the appeal and the motions to quash the appeal at the same time. Argument in that case, *County of Delaware, Pennsylvania v. Pennsylvania Public Utility Commission*, 455 CD 2021, has not yet been scheduled. If the Commission were to proceed further with the remand now as Aqua asks, on the theory that the March 30 Order is non-appealable,² but the Court later determines that the March 30 Order is appealable and denies the motions to quash, the Commission's lack of jurisdiction to proceed further with the remand will be confirmed – even if the Court were to affirm the March 30 Order on the merits. The result would be that whatever occurs in the remand proceeding while the appeal from the March 30 Order is pending will be deemed a nullity.³ Proceeding further now in the manner Aqua suggests thus risks squandering the resources of the Commission and the many affected parties.

Second, in contrast to the need for expedition Aqua assumes, the Commission in the March 30 Order did not ascribe any particular urgency to either initiation or completion of proceedings on remand, and gave no direction to the ALJ to complete the remand proceeding and render a new Recommended Decision by a date certain. This is consistent with Aqua's own open-ended voluntary waiver of the six-month statutory deadline in a Section 1329 application. Instead, the Commission accorded the ALJ broad discretion to undertake "such further proceedings as may be appropriate in light of the new developments in the case." *Id.* This directive is even more appropriate now than it was when the March 30 Order issued. Then, there were a number of issues related to Aqua's Application to acquire DELCORA's assets that remained open and unresolved and that needed to be addressed on remand. *See* SPMT's Brief in Opposition to Aqua's Petition for Interlocutory Review and Answer to a Material Question, filed May 7, 2021 at 10-11 (listing the host of unresolved issues related to Aqua's Application). To SPMT's knowledge, none of those open issues – ranging from critical path environmental approvals Aqua needs but lacks, to approvals or consents required from courts and regulatory agencies other than the Commission -- have been resolved during the past year. Moreover, the passage of time alone would be reason enough to revisit virtually every aspect of Aqua's Application. But now that the County of Delaware will be acquiring DELCORA's assets, there inevitably will be additional issues related to DELCORA's planned sale of those assets to Aqua. All of this means that further proceedings – if they resume at all – are likely to require substantial time and dedication of resources by the Commission and all of the affected parties. Undertaking the necessary adjudicative process while

² Pa. R.A.P. 1701(b)(6) allows the Commission to proceed further notwithstanding an appeal if the order appealed is "interlocutory and nonappealable."

³ Pa. R.A.P. 1701; *Wexford Science and Technology, LLC v. City of Pittsburgh Zoning Bd. of Adjustment*, 260 A.3d 316, 328 n. 7 (Pa. Cmwlth. 2021) (trial court proceedings held and order entered while appeal from interlocutory order denying intervention that appellate court deemed appealable was pending were nullities). *See Jones v. W.C.A.B. (Midland-Ross Corp.)*, 612 A.2d 570 (1992), *aff'd*, 612 A.2d 570 (Pa. 1994) (as a general rule, a lower court may no longer proceed in a matter after an appeal is filed and Commonwealth Court has applied the same Rule to administrative tribunals, absent a specific statutory provision to the contrary).

the Commission's jurisdiction to do so is in doubt and the March 30 Order is subject to potential reversal on the merits is not in the public interest.

Third, Aqua inappropriately seeks relief from the Commission via letter in a highly contested proceeding. There is no provision in the Commission's regulations for letter requests and no instruction to parties on the time allowable for responses to such requests. *See* 52 Pa. Code Ch.5.A. Moreover, seeking relief via letter lacks required notice to affected parties because it does not contain a notice to plead. Aqua's letter relief should be denied on this basis as well.

For these reasons, SPMT respectfully asks that Aqua's letter request that the Commission act on and grant Aqua's Petition for Interlocutory Review and Answer to a Material Question be denied.

Respectfully submitted,

/s/ Kevin J. McKeon

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cc: Administrative Law Judge F. Joseph Brady (fbrady@pa.gov)
Kathryn G. Sophy, Director, Office of Special Assistants (ksophy@pa.gov)

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Aqua Pennsylvania :
Wastewater, Inc. pursuant to Sections 1102, :
1329 and 507 of the Public Utility Code for : Docket No. A-2019-3015173
approval of the acquisition by Aqua of the :
wastewater system assets of the Delaware :
County Regional Water Quality Control :
Authority :

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the forgoing document upon the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

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Dated: April 6, 2022